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No. 88-5050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL HOLLAND,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Illinois

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the State's use of peremptory challenges to remove black prospective jurors on grounds of race violates the Sixth Amendment right to trial by jury.

2. Whether petitioner, a white man, has standing to challenge as violative of that constitutional right the removal by the prosecutors of black prospective jurors from the jury in petitioner's case.

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The decision of the Illinois Appellate Court, First District, ordering retrial in this cause is reported as *People* v. *Daniel Holland*, 147 Ill.App.3d 323, 509 N.E.2d 1230 (1986) and is contained in the Joint Appendix at pp. 16-52. The opinion of the Illinois Supreme Court reversing the appellate court and reinstating the convictions is reported as *People* v. *Daniel Holland*, 121 Ill.2d 136, 520 N.E.2d 270 (1987) and is included in the Joint Appendix at pp. 53-100.

JURISDICTION OF THE COURT

The jurisdiction of this Court is based on 28 U.S.C. section 1257(3). The opinion of the Illinois Appellate Court was issued August 29, 1986 and leave to appeal by the State was filed with the Supreme Court of Illinois. The Illinois Supreme Court accepted the cause for review and rendered its decision on December 21, 1987. Petitioner thereafter submitted a request for rehearing but rehearing was denied on April 5, 1988. Petitioner subsequently filed his petition for a writ of certiorari with this Court on June 3, 1988. This Court granted that petition by its ruling of February 27, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Holland elected to submit the question of his guilt or innocence of the charges against him (rape, deviate sexual assault, armed robbery, aggravated battery, and aggravated kidnapping) to a jury for determination. Consequently, prospective jurors were summoned to the courtroom for selection as members of his jury. Among the 30 (J.A. 7), 35 (J.A. 8) or 40 (J.A. 8, 13) assembled prospective jurors were two blacks, Ms. Conley and Mr. Mosly. (J.A. 8-10) Both black potential jurors were questioned by the judge on their qualifications to serve as jurors in the case.

Ms. Conley related she resided in Chicago where she had lived for 6 years. She currently lived with her parents, having graduated that June from Northeastern University with a bachelor of science degree. Both of her parents were employed at Rockford Paper Mills, with her father working in the maintenance department and her mother packing boxes in the packing section. (J.A. 2-3)

She had never served as a juror before and knew none of the lawyers or the petitioner. She had heard nothing about the case nor had she read anything concerning it.

None of her friends or relatives were employed by any police force or by the State's Attorney's Office. Neither she nor a member of her family nor any close friend had ever been a crime victim. (J.A. 3)

Nothing about the nature of the charges in the case in any way prevented her from returning a fair and impartial verdict if she were selected as a juror in the case. She felt no bias or prejudice against an accused simply because he was charged with a crime. She knew of no reason whatsoever why she could not render a fair and impartial verdict in the case if serving as a juror. (J.A. 3-4)

Without any effort to inquire into difficulties Ms. Conley might have participating as a juror, the prosecutor summarily dismissed her immediately following her responses. (J.A. 4)

Subsequently, Mr. Mosly explained he resided in Chicago, having lived in his home at the time for 3 months. Prior to this home, he had dwelt in Chicago and had lived in that residence for 11 years. He was living with his wife who had been employed in a clerical capacity with Allstate Insurance for a year and a half. Mr. Mosly worked as an inventory clerk for Polk Brothers where he had been employed about two months. Before that, he had been attending school at Northeastern University as a general student. (J.A. 4-5)

He knew none of the lawyers and did not know petitioner Holland. Nor had he heard or read about the case. He had no friends or relatives in either the State's Attorney's Office or on any police force. He possessed no bias or prejudice against a person for being charged with a crime and there was nothing about the nature of these charges which would cause him to lose his fairness and impartiality. (J.A. 5)

Mr. Mosly acknowledged a friend of his had been a murder victim in Chicago about 3 weeks earlier but there was nothing about that experience which caused him to conclude he could not be fair and impartial as a juror in this case. Neither he nor any members of his family nor a close friend had ever been accused of a crime. He could not discover any reason why he could not render a fair and impartial verdict if chosen as a juror. (J.A. 6)

Again without seeking to explore possible grounds for Mr. Mosly's inability to serve as a juror, the prosecutor peremptorily excused this second black prospective juror as well. (J.A. 6)

Counsel thereafter voiced objection to the State's use of its peremptory challenges to remove the only available black prospective jurors. Counsel contended:

> "the defendant has a right to be—to a jury to be drawn from a representative cross section of the community and be tried by a representative cross section of the community. The State has systematically excluded the two blacks. It did not even ask them one question; just took one look at them and excused them pursuant to their right to a peremptory challenge." (J.A. 7-8)

The State responded to this objection by claiming the peremptory challenges were not based on race and such use had not been its intent. (J.A. 9)

Counsel replied he relied on *People* v. *Wheeler*, *Commonwealth* v. *Soares*, and the *Taylor* case in this Court and claimed the white petitioner could also object to peremptory challenges used to exclude black prospective jurors, stressing "in our case the defendant has an identical protection under the Sixth Amendment against the systematic removal of blacks from the venire." (J.A. 9-10) Counsel urged application of *Wheeler* to conclude the

prosecution struck all members of a cognizable group who shared only one characteristic—their race—and did so "simply because of their race and not any specific bias." (J.A. 10-11) Counsel thus concluded "the prospective jury, so far, has not been a representative cross section of the community and my defendant's Sixth Amendment right to a jury trial has been violated." (J.A. 11-12)

The judge thereupon denied the motion "in toto and all respects" on the basis of *Swain* v. *Alabama* and Illinois decisions contrary to *Wheeler*. (J.A. 13-15) Petitioner was subsequently convicted before the all-white jury of deviate sexual assault, rape, armed robbery, and aggravated kidnapping. (Supp.R. 267)

On appeal to the Illinois Appellate Court, First District, his convictions were reversed and he was ordered retried for error in failing to suppress his statements. (J.A. 16-47) The court did not rule on petitioner's alleged error in such removal of black prospective jurors given its remand on other grounds and the assumption any error would not be repeated. (J.A. 20)

On State appeal, the Illinois Supreme Court overturned the appellate court's order of retrial and rejected petitioner's claims of error in excusing black potential jurors. It first determined petitioner had no standing to argue under *Batson* v. *Kentucky* since he was white. (J.A. 70) It then rebuffed petitioner's Sixth Amendment claim as follows:

> "Defendant argues, in the alternative, that the exclusion of the only two black prospective jurors in the jury array violated his sixth amendment right to trial by a jury representing a fair cross section of the community. Neither this court (*People* v. *Gaines* (1984), 105 Ill.2d 79, 88; *People* v. *Williams* (1983), 97 Ill.2d 252, 278-80) nor the Supreme Court (*Batson* v.

Kentucky (1986), 476 U.S. 79,—n 4, 90 L.Ed.2d 69, 79 n 4, 106 S.Ct. 1712, 1716 n 4) have so held. We decline to overrule this court's prior holdings by finding that the peremptory exclusion of blacks or other minorities violates the fair cross section requirement." (J.A. 70-1)

Justice Simon dissented from this holding, concluding petitioner had stated a basis for finding a valid allegation of constitutional infringement of the right to trial by impartial jury. (J.A. 94-100) Consequently, he would remand for a hearing into the State's explanation of its peremptory challenges. (J.A. 100) However, because no such hearing was ordered by the Illinois Supreme Court, the State remained unobliged to account for its exclusions of the only two available black prospective jurors and its creation of an all-white jury.

SUMMARY OF ARGUMENT

The narrow question presented by this case is whether the use of peremptory challenges by a prosecutor to excuse black venirepersons solely on the basis of their race, found to violate the Fourteenth Amendment Equal Protection Clause in *Batson* v. *Kentucky*, also violates the Sixth Amendment right to trial by an impartial jury. The *Batson* rule, based on the Fourteenth Amendment Equal Protection Clause, applies only in cases where the defendant himself is a member of the cognizable group excluded from the petit jury. A similar rule predicated on the Sixth Amendment would apply in all cases, irrespective of the race of the defendant and would, therefore, apply to petitioner, who is white.

The Sixth Amendment requires that petit juries be drawn from a fair cross-section of the community. This Court in *Taylor* held that the purpose of the fair cross-section rule—"to make available the commonsense judg-

ment of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps unconditioned or biased response of a judge"—is frustrated if distinctive groups are excluded from the jury pool. This purpose is no less frustrated if the prosecutor excludes members of those distinctive groups from actual jury service by racially motivated use of the peremptory challenge.

The fair cross-section requirement cannot guarantee that the petit jury will proportionately represent the community or even that a member of a particular defendant's race will sit on the jury. This goal appears to be impossible. But the fair cross-section requirement is meaningless if it does not lead to the representation of diverse elements of the community on trial juries. However perfectly representative it may be, the venire itself makes no decisions. If the Sixth Amendment requires that the venire represent a fair cross-section of the community, it is because the defendant must have a fair possibility that the petit jury will, to the extent possible, be similarly constituted. The Sixth Amendment does not mandate that the representative character of the venire be carried over to the petit jury. It does, however, prohibit racially motivated elimination of this possibility. If the Sixth Amendment requirement that petit juries be drawn from a fair cross-section of the community is to have anything other than cosmetic meaning, it must require that the petit jury be *fairly* drawn from the venire, without exclusion of eligible jurors solely because of their race.

There is an inherent tension between the requirement of representativeness in the jury pool and the peremptory challenge. Both are intended to secure an impartial jury. To the extent that the Constitution requires a mix of individual viewpoints on the jury so as to reflect the

community proportionately, however, it appears at least theoretically that peremptory challenges would be correspondingly curtailed. Rather than suggesting that peremptory challenges be eliminated because they can be abused, however, petitioner urges this Court to adopt a remedy which will be the least intrusive restriction on the peremptory challenge.

Toward this end, petitioner suggests that the *Batson* remedy, minus the requirement that the accused be a member of the excluded "cognizable group", is adequate. Given the decision in *Batson*, and the resulting inconsistency in jury selection practice if the same rule is not applied under the Sixth Amendment, this Court should take the short step of applying the rule to the relatively smaller number of cases not covered by *Batson*.

While at first blush there appear to be conceptual problems applying restrictive equal protection concepts of suspect classes in the more expansive context of the Sixth Amendment, petitioner suggests there is ample precedent for doing so. The Sixth Amendment fair cross-section cases themselves grew out of jury representativeness decisions under the equal protection principles. Those cases were spawned by an extensive history of racial discrimination in jury selection. This country's intransigent history of racial discrimination and its corresponding blight on the jury system warrant, as a matter of both public policy and constitutional imperative, application of equal protection principles to selection of an impartial jury under the Sixth Amendment. To prevent the overzealous or biased prosecutor from continuing to undermine years of action by this Court to remedy racially motivated exclusion of blacks from jury service, petitioner urges this Court to hold the Sixth Amendment

bars exclusion of eligible jurors solely because of their race.

I. THE PROSECUTOR'S USE OF PEREMPTORY CHALLENGES TO EXCUSE BLACK PROSPECTIVE JURORS SOLELY ON THE BASIS OF THEIR RACE VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY.

The Sixth Amendment to the United States Constitution assures the right to trial by an impartial jury. In a long line of cases this Court has addressed whether the Sixth Amendment prohibited exclusion of blacks, women and other groups from jury pools; whether less than unanimous jury verdicts were violative of the Sixth Amendment; whether six or five person juries were constitutionally permissible. In each of these cases, the result has turned on whether the challenged practice has denied the accused a fair *possibility* of obtaining a representative cross-section of the community on his jury.

In *Williams* v. *Florida*, 399 U.S. 78, at 100 (1970) this Court found a six person jury constitutionally adequate to ". . . provide a fair possibility for obtaining a representative cross-section of the community." In *Ballew* v. *Georgia*, 435 U.S. 223, at 234, 242, 245 it held a five person jury was too small to include an adequate community cross-section:

> ". . . substantial doubt about the ability of juries truly to represent the community as membership decreases below six." (Opinion of Justice Blackmun, writing for the Court, 435 U.S. at 242)
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> * * *
>
> ". . . a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth

and Fourteenth Amendment." (Opinion of Justice White, 435 U.S. at 245.)

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) four justices found the less than unanimous jury verdict constitutionally permissible because requirement of unanimity does not materially contribute to the exercise of commonsense judgement which a jury will naturally come to, provided the jury "consists of a group of laymen representative of a cross section of the community . . ." (406 U.S. at 410-411) Again in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) this Court held the Sixth Amendment prevented exclusion of women from the jury pools:

> "If the fair cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn." (Justice White, writing for the majority, 419 U.S. at 533)

As the reviewing court found in *McCray* v. *Abrams*, 750 F.2d 1113 (2nd Cir. 1984), the analytical touchstone in each of these cases is whether the challenged practice deprived the accused of a "possibility of a jury that represented a cross section of the community." (*McCray*, at 1125.) If the Sixth Amendment requirement that petit juries be drawn from a fair cross-section of the community is to have more than mere cosmetic meaning, it must require that the petit jury be *fairly* drawn from the venire, without racially motivated exclusion of venirepersons, leaving intact the *possibility* that the jury actually selected will represent a cross-section of the community.

A. The Right To The Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury Ensures (1) A Commonsense Judgment Of The Community, (2) A Sharing In The Administration Of Justice By All Groups In The Community And (3) Preserved Public Confidence In The Fairness Of The Judicial System.

Believing that the Sixth Amendment right to trial by jury was "fundamental to the American scheme of justice," this Court applied the protection to state criminal defendants through the due process clause of the Fourteenth Amendment in *Duncan* v. *Louisiana*, 391 U.S. 145, 149, 153-4 (1968). In doing so, this Court emphasized that juries operate to protect "against arbitrary rule" (391 U.S. at 151), to "prevent oppression by the Government" (391 U.S. at 155-6), and to guard both "against the corrupt or overzealous prosecutor" and "the compliant, biased or eccentric judge." (391 U.S. at 156) (See also *Williams* v. *Florida*, 399 U.S. 78 (1970) holding the jury a "safeguard against arbitrary law enforcement" (at 87) and quoting *Duncan* (at 100); *Ballew* v. *Georgia*, 435 U.S. 223, 229 (1978) quoting *Williams* and *Duncan*; *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) citing *Duncan*.) Thus, one such purpose of providing for the fair possibility for a representative cross-section of the community on the jury is to ensure the commonsense judgment of society to so protect the accused citizen. (*Lockhart* v. *McCree*, 476 U.S. 162, 174 (1986))

Further, in *Lockhart*, this Court stressed, on the basis of *Taylor*, additional purposes for permitting a community cross-section to serve on the jury: ensuring a sharing in the administration of justice as part of the civic responsibility of all and preserving public confidence in the fairness of the criminal justice system. (476 U.S. 162, 174-5)

This Court must now, to assure as best as legally and humanly possible these endorsed purposes of trial by jury, hold the use of peremptory challenges by a prosecutor to excuse black venirepersons solely on the basis of their race, found to violate the Fourteenth Amendment Equal Protection Clause in *Batson* v. *Kentucky*, also violates the Sixth Amendment right to trial by an impartial jury.

In *Teague* v. *Lane*, 489 U.S. ___ 103 L.Ed.2d 334 (1989), this Court neared approval of a universal constitu-

tional right to a jury from which eligible jurors may not be validly removed by peremptory challenge on the basis of race.

There, four Justices agreed that the accused would suffer a constitutional violation of his right to trial by an impartial jury by State removal on racial grounds by peremptory challenge of blacks eligible for jury service.[1] This Court should now establish that right in this case.

To date, 9 States[2] and 2 federal circuits[3] have recognized a constitutional right to a jury selected in a racially neutral manner in order to achieve the fair possibility it contains a representative cross-section of the community. It is time this Court agreed and proclaimed that right the supreme law of the land.

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[1] No rejection of such a right was announced in *Teague*. Four Justices were suspicious of the nature of the right involved because the test of *Duren* v. *Missouri* was proposed as applicable to the situation of blacks removed by peremptory challenge from the petit jury. (See 103 L.Ed.2d at 350 n 1) Petitioner here does *not* advocate using *Duren* as the standard by which to determine if the State's exclusion of prospective jurors by use of peremptory challenge violates the constitution. Thus, skepticism as expressed in *Teague* on the validity of such a right is unwarranted here.

[2] California: *People* v. *Wheeler*, 148 Cal. Rptr. 890, 583 P.2d 748 (1978); Massachusetts: *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); New Mexico: *State* v. *Crespin*, 94 N.M. 486, 612 P.2d 716 (1980); New Jersey: *State* v. *Gilmore*, 103 N.J., 508, 511 A.2d 1150 (1986); Delaware: *Riley* v. *State*, 496 A.2d 997 (1985); Florida: *State* v. *Neil*, 457 So.2d 481 (1984); Arizona: *State* v. *Superior Court*, 157 Ariz. 541, 760 P.2d 541 (1988); Texas: *Seubert* v. *State*, 749 S.W.2d 585; Colorado: *Fields* v. *People*, 732 P.2d 1145 (1987).

[3] Second Circuit: *McCray* v. *Abrams*, 750 F.2d 1113 *remanded* 92 L.Ed.2d 705 *reconfirmed Roman* v. *Abrams*, 822 F.2d 214 (2d Cir. 1987); Sixth Circuit: *Booker* v. *Jabe*, 775 F.2d 762 *remanded* 92 L.Ed.2d 705 *reinstated* 801 F.2d 871 *cert. denied* 93 L.Ed.2d 860.

1. The Right Ensures A Commonsense Judgment Of The Community.

The essential feature of trial by jury is "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." (*Williams*, 399 U.S. at 100) The American jury is thus a conduit through which the community expresses its sense of justice.

Toward this end, this Court has repeatedly stated that, as a constitutional objective, juries should constitute a truly representative body of a cross-section of the community. (*Taylor*, 419 U.S. 522 at 527 quoting *Smith* v. *Texas*, 311 U.S. 128, 130 (1940); *Ballew*, 435 U.S. 223, 230, 237; *Glasser* v. *United States*, 315 U.S. 60, 85-6 (1942); *Ballard* v. *United States*, 329 U.S. 187, 191 (1946); *Carter* v. *Jury Comm.*, 396 U.S. 320, 330 (1970)) To ensure the fair possibility the petit jury will reflect the judgment of the community by containing cognizable groups, this Court must now insist there be no use by the prosecutor of peremptory challenges in any prosecution to exclude on grounds of race blacks available for jury service.

In the past, this Court has banned obstacles to the inclusion of community groups such as blacks in the roster of eligible jurors. (*Taylor*, 419 U.S. 522; *Duren* v. *Missouri*, 439 U.S. 357 (1979); *Ballard*, 329 U.S. 187) This Court there acted to require cognizable groups be placed on the jury lists in order to assure the fair possibility for eventually obtaining the desired representative community cross-section on the petit jury. (See *Williams*, 399 U.S. at 100.) Thus, in *Taylor* this Court forthrightly declared that the presence of the fair cross-section of the

community on the listings from which trial juries were drawn was essential to fulfilling the constitutional guarantee to a jury trial. But, in reaching this holding, this Court must have been concerned that the exclusion of any distinct group from the venire necessarily precluded its presence on the petit jury. (See *Taylor*, 419 U.S. 522, 538: absence of women from jury lists "operates to exclude them from petit juries, which in our view is contrary to the command of the Sixth and Fourteenth Amendments.") Hence, rather than simply creating the right to a representative venire from which the prosecutor could exclude cognizable groups by peremptory challenge, this Court was endeavoring to assure, as much as legally possible, the fair possibility that petit juries would actually contain cognizable groups comprising the community.

For, it is the petit jury and not the venire which is called upon to express, through desired interaction, the community's decision (*Booker* v. *Jabe*, 775 F.2d 762, 770 (6th Cir. 1985) *remanded* 92 L.Ed.2d 705, *reinstated* 801 F.2d 871 (6th Cir. 1986) *cert. denied* 93 L.Ed.2d 860 (1987); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, 513 (1979)) Since it is thus the petit jury which is expected to act as the voice of society in truly representing the sense of the entire community (*Ballew*, 435 U.S. 241, 242), it does little good to simply assure procedures for a representative venire. It would be meaningless to merely provide for a representative cross-section on the venire from which the jury is selected but then fail to provide for the fair possibility the representative cross-section will reach the petit jury. Just as racially neutral practices are necessary in preparing and selecting the venire, so too racially neutral procedures are necessary in selecting the petit jury.

The prosecutor's use of peremptory challenges to remove cognizable groups such as blacks from the petit

jury would interfere with the racially neutral procedures by which the jury should be selected and would nullify this Court's objectives in creating the representative cross-section rule. This court in *Lockhart* v. *McCree* appreciated that exclusion of group members on grounds unrelated to their ability to serve as jurors "arbitrarily skewed" the juries "in such a way as to deny criminal defendants the benefits of the common-sense judgment of the community." (476 U.S. 162, 175 (1986)) When black potential jurors are unlawfully excluded from the petit jury, the desired interaction among different groups in the community does not occur and the purpose of the jury is thereby frustrated. (See *Ballew*, 435 U.S. at 234: "counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.") Discriminatory use of peremptory challenges to disrupt this needed counterbalancing of views inhibits this essential trial jury activity.

In *Batson* v. *Kentucky*, this Court condemned a procedure by which to deny a defendant the community's judgment when it stressed that "the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at 'other stages in the selection process'". (476 U.S. 79, 88 (1986)) To function as the expression of the will of society, the petit jury must contain, as best the system can assure, the broad spectrum of society's representative groups. An accused must be deemed to have the constitutional right under the Sixth Amendment to the fair possibility his petit jury will contain blacks and, thus, a representative cross-section of the community. (See *Williams*, 399 U.S. 78, 100)

In *Peters* v. *Kiff*, this Court declared its unwillingness "to make the assumption that the exclusion of Negroes has relevance only for issues involving race." Rather, it

stressed that removal "from the jury room" of those "qualities of human nature and varieties of human experience" provided by identifiable groups in the community deprived the trial jury of crucial perspectives which "may have unsuspected importance in any case that may be presented." (407 U.S. 493 at 503-4) The purpose of recognizing the right of the accused to an opportunity for his jury to reflect all elements in the community is to avoid the unnecessary loss of that combined community judgment. Without such a constitutional right, there will be no assurance that citizens who rely upon the jury as the trier in their case will receive, as best the judicial system can provide, a trial before a representative cross-section of the community.

2. The Right Ensures A Sharing In The Administration Of Justice By All Groups In The Community.

The second acknowledged purpose of a process which bars interference with the fair possibility community groups may serve on the jury is to implement the belief, held by this Court, that all citizens should share in the administration of criminal justice. (*Lockhart*, 476 U.S. 162 at 175) One such common method of citizen sharing in judicial administration is service on a petit jury. The consequence of restricting such participation, as by removal of groups such as blacks from the petit jury because of their race, is to signify an assumption members of the black community are unfit to function as responsible citizens due to their racial inferiority.

Prosecutorial use of peremptory challenges on racial grounds, no matter the race of the defendant, is directly harmful to the prospective juror excluded from jury service and indirectly harmful to every black member of society because each is thereby told by the State that

blacks lack the qualifications necessary to judge another (in this case, a white person). Removal from the trial jury by peremptory challenge of black citizens on grounds of race, an act thereby stigmatizing the individuals and the class and branding all with the government's stamp of racial inferiority (see *Peters* v. *Kiff*, 407 U.S. 493, 499), must be condemned and forbidden whenever and wherever it occurs.

A partial step towards this end was taken by this Court in *Batson* when it outlawed a prosecutor's use of peremptory challenges to strike blacks from the jury "on the assumption that blacks as a group are unqualified to serve as jurors." (*Batson* v. *Kentucky*, 476 U.S. 79, 97) However, under *Batson*, only black defendants are authorized to contest such racial misuse of the prosecutor's power of juror exclusion. White defendants have no comparable weapon to fight racial bigotry and the war against racial discrimination is thereby crippled. This restriction is certainly detrimental to the black citizens so victimized by continuing racial prejudice and society's ability to combat racial discrimination should not be so limited.

It cannot be just to prohibit State reliance on racial stereotyping in selecting a jury for a black defendant's trial but to sanction that very same prejudice when choosing a jury in the case of a white defendant. The need for remedial action is no less urgent there and the appropriate means for confronting racial discrimination in the selection of the petit jury in such a case is applying the Sixth Amendment.

3. The Right Ensures Preserved Public Confidence In The Fairness Of The Judicial System.

The final purpose for recognizing the right to the fair opportunity for a representative cross-section on the petit

jury is the need to maintain public confidence in the integrity of the community's judicial system. (*Lockhart*, 476 U.S. 162, 174-5)

Impermissible removal of members of a cognizable group such as blacks offends this public interest in the integrity of its judicial process (*Booker*, 775 F.2d 762 at 772) and casts legitimate doubt on the integrity of the whole judicial system. (*Peters*, 407 U.S. 493 at 502; *Rose* v. *Mitchell*, 443 U.S. 545, 555-6 (1979)) "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." The exclusion of blacks on the basis of race "impairs the confidence of the public in the administration of justice" and constitutes an "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts" (*Rose* v. *Mitchell*, 443 U.S. at 556; quoting from *Ballard* v. *United States*, 329 U.S. 187, 195 (1946))

There can be no image of a fair jury in the eyes of the community if the process of selecting it sanctions discrimination. Juries must both be fair and be recognized as such by the public. Establishing the right to a trial jury selected by procedures which bar the State from excluding black jurors from actual jury service solely because of their race, achieves the objective of preserving public confidence in the fairness of the criminal justice system. Thus, this Court should rule that the petit jury must be selected without invalid governmental interference in the otherwise natural opportunity for cognizable groups to serve on the panel. It is appropriate for this Court to simply bar the government from improperly interfering with the fair possibility that members of distinct groups, in this case blacks, will serve on a trial jury by using its peremptory challenges invalidly to excuse them.

B. The Right To The Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury Does Not Command That Each Petit Jury Must Mirror The Community.

This Court has repeatedly emphasized the impossibility of guaranteeing each and every petit jury selected throughout the country is actually representative of the community. (*Taylor*, 419 U.S. 522, 538; *Duren*, 439 U.S. 357, 364 n 20; *Lockhart*, 476 U.S. 162, 173-4) Petitioner does not dispute such conclusions and does not quarrel with the assessment he has no right to a petit jury which contains every identifiable group in the community. He does, however, have the right to the fair possibility that such distinct groups will not be blocked from serving on his jury by racially motivated use of the peremptory challenge to exclude black venirepersons from actual jury service.

The obligation of the State is not to locate and seat representative jurors on the petit jury but to avoid illegally unseating those otherwise available for jury service by use of peremptory challenges. While, admittedly, no one is entitled to a petit jury that proportionally reflects all segments of the community, everyone is nevertheless constitutionally entitled to the fair possibility that the jury will approximate as nearly the ideal cross section of the community as the process of random draw permits. (*Soares*, 387 N.E.2d 499, 516; *Wheeler*, 148 Cal.Rptr. 890, 903; *People* v. *Payne*, 106 Ill.App.3d 1034, 1037, 436 N.E.2d 1046 (1982) *reversed* 99 Ill.2d 135, 457 N.E.2d 1202 (1983)) Thus, here, petitioner seeks "not a requirement that petit juries actually chosen must be an exact microcosm of the community, but rather the guarantee that the State's use of peremptory challenges 'may not restrict unreasonably the possibility that the petit jury

will comprise a representative cross section of the community.'" (*Gilmore*, 511 A.2d 1150 at 1160) Any argument to the contrary is simply not persuasive when viewed in light of the fact that petitioner does not argue that he is entitled to a jury of any particular composition.

What petitioner is entitled to is a ban on the State's "active discrimination" to peremptorily excuse blacks from the jury on racial grounds. (*United States* v. *Cecil*, 836 F.2d 1431, 1445 (4th Cir. 1988)) This Court must now condemn the State's resort to discriminatory use of peremptory challenges to do indirectly what it cannot do directly. A government which obeys the dictates of this Court by including cognizable groups in the venire only to frustrate the expectations of this Court and the rights of the accused by removing them from the petit jury mocks the constitution so sacred to our system. It is time for this Court, as it did in *Batson*, to forbid the racial misuse of peremptory challenges to exclude blacks from the jury because such exclusion violates valued Sixth Amendment constitutional safeguards.

C. The Right To The Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury Will Not Unduly Harm The Use Of State Peremptory Challenges.

As this Court implicitly recognized in *Swain* v. *Alabama*, 380 U.S. 202 (1965), there is an inherent tension between peremptory challenges and the goal of a representative jury. Although this clash may have seemed irreconcilable when *Swain* was decided, this Court in *Batson* v. *Kentucky* held that the peremptory challenge must yield when exercised solely on the basis of race to exclude blacks otherwise qualified to serve as jurors.

The clash between the peremptory challenge and the goal of jury representativeness is equally apparent in the

context of the Sixth Amendment. To effectuate the purpose of achieving a commonsense judgment based upon community participation, this Court has prohibited the exclusion of certain groups from the jury pool. *Taylor; Duren; Castaneda* v. *Partida*, 430 U.S. 482 (1977)) Although these cases stand for the proposition that persons cannot be excluded from jury pools on the basis of membership in a group, the peremptory challenge may be used for just such a purpose. The peremptory challenge, therefore, "by its very nature, operates to exclude individuals and even groups, thus interfering with the chances of obtaining a jury fairly representative of the community." (Doyel, *In Search of a Remedy for the Racially Discriminatory Use of Peremptory Challenges*, 38 Okla. L. Rev. 385, 439 (1985))

The inevitable clash between the right of the accused under the Sixth Amendment to the fair possibility that blacks will reach his petit jury and the prosecutor's use of a peremptory challenge must be resolved as in the *Batson* case. Thus, no undue damage to the State peremptory challenge should result.

This Court observed in *Lockhart* v. *McCree* that strict application of the fair cross-section ideal to the petit jury would likely require the elimination of peremptory challenges. (476 U.S. at 178) In *Batson* v. *Kentucky*, 476 U.S. 79 at 103, 107-8, Marshall, J., concurring, advocated on other grounds abolition of peremptory challenges. Petitioner contends that the racially based exercise of peremptory challenges can be severely curbed if not eliminated without this drastic step.

No intrusion upon the prosecutor's free use of peremptory strikes even arises until the court becomes convinced that defendant has established a prima facie case of racial

discrimination. Only after the prosecutor first intrudes upon the accused's constitutional right to the fair possibility of blacks on his jury is the judge authorized to tamper with the prosecutor's use of his peremptory privilege. Even then, the prosecutor need only explain his challenge on neutral grounds to avoid sanctions. Neither the right nor its enforcement signifies the end of the peremptory challenge as an effective jury selection tool. Rather, they spell the beginning of a more equitable jury selection process.

The peremptory challenge, if properly used, is certainly an essential tool in selecting a fair and impartial jury. No significant damage to its legitimate exercise, as defined in *Batson*, will result from a holding of this Court that prosecutors may not misuse their powers of peremptory challenge to frustrate the fair possibility that blacks will sit on a defendant's jury.

D. To Effectuate The Right To A Fair Possibility For A Representative Cross-Section Of The Community On The Petit Jury, The Standards Of *Batson* v. *Kentucky* Should Be Applied

This Court effectuated the right recognized in *Batson* v. *Kentucky*, 476 U.S. 79 (1986) with a simple procedure for discovering a violation of that right. The same simple standards are applicable for violation of the like right under the Sixth Amendment.

The appropriate procedure, like the method approved in *Batson* (described as a "practical model to follow" (*Seubert* v. *State*, 749 S.W.2d 585, 588 (Tex.App. 1988)), involves two steps in the prima facie case: (a) removal by peremptory challenge of members of a cognizable group and (b) the clear likelihood the members were removed on

the basis of group association.[4] (See *Wheeler*, 583 P.2d 748, 764; *Soares*, 387 N.E.2d 499, 516-17; *McCray* v. *Abrams*, 750 F.2d 1113, 1131-2 (2nd Cir. 1984) *remanded* 92 L.Ed.2d 705 (1986) *reconfirmed Roman* v. *Abrams*, 822 F.2d 214 (2nd Cir. 1987); *Booker*, 775 F.2d 762, 773.)

While this Court has never provided a definition of "distinctive group in the community" whose removal would interfere with a representative cross-section on the jury, it has noted that such a concept must be linked to the purposes of a jury composed of a community's fair cross-section. (*Lockhart*, 476 U.S. at 174) In this regard, blacks involved here, have clearly been recognized as a cognizable group, the removal of which would infringe upon the right to trial by jury. (*Lockhart* v. *McCree*, 476 U.S. 162 at 175; *United States* v. *Hafen*, 726 F.2d 21, 23 (1st Cir. 1984); *United States* v. *Musto*, 540 F.Supp. 346, 354 (D.N.J. 1982); *People* v. *Harris*, 36 Cal.3d 36, 679 P.2d 433, 440-1 (1984); *Soares*, 387 N.E.2d 499, 516.)

The likely removal of the group members on the basis of their membership (in case of blacks, as here, on racial grounds) would, as in *Batson*, be a matter of all the facts and circumstances in the case.

The rebuttal burden on the prosecution in lower courts where blacks have been removed from the petit jury by State peremptory challenge has been simply to show that those challenges were not used on the basis of group affiliation. (*Soares*, 387 N.E.2d 499, 517; *Wheeler*, 583

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[4] Although *Batson* considered an equal protection violation and the constitutional infraction arises here under the Sixth Amendment, the differences should be deemed of "no consequence." (*Lindsey* v. *Smith*, 820 F.2d 1137, 1145-6: facts alleged to be Sixth Amendment infringement same as equal protection violation and rebuttal to either based on same facts)

P.2d 748, 765) Since the State possesses a legitimate interest in validly using its peremptory challenges to remove unqualified jurors, it need only demonstrate racially neutral selection criteria. Therefore, to rebut any prima facie case under the Sixth Amendment, the prosecutor need only show, as under *Batson*, 476 U.S. at 97, 98, use of each challenge on the basis of justifiable criteria unrelated to the race of the stricken juror.[5]

This Court should thus now recognize petitioner's right to a petit jury fairly drawn from the venire without the exclusion of blacks by the State through peremptory challenge because of their race so as to thereby frustrate the fair possibility the jury will contain a representative cross-section of the community. It should equally conclude the standards of *Batson* apply so that, under that procedure, he is entitled to a hearing on the State's misuse of its peremptory challenges to exclude all blacks from his jury.

E. The *Batson* Holding Is Appropriate In the Context Of Sixth Amendment Violations

While essentially an equal protection holding, the application of *Batson* as explained herein in section D is an appropriate solution in the context of Sixth Amendment violations on two grounds.

First, as in *Batson*, the State excluded black prospective jurors here and the *Batson* process is the proper

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[5] This element of *Batson* is also appropriate for determining a Sixth Amendment violation since in discussing in *Batson* the explanation necessary to rebut a prima facie equal protection claim, this Court relied on standards developed in lower courts to judge "rebuttals to sixth amendment fair cross-section challenges to the use of peremptory strikes". (*Lindsey* v. *Smith*, 820 F.2d 1137 at 1146 n 11)

response whatever the race of the accused where blacks are removed. This Court need not determine whether the exclusion of other cognizable groups violates the Sixth Amendment or, if so, what the procedures for raising the error should be.

Second, the adoption of *Batson* procedures to Sixth Amendment situations is sensible under reasoned, persuasive authority. In *Lindsey* v. *Smith*, 820 F.2d 1137 (11th Cir. 1987), the court noted that where, as here, both the Sixth Amendment and equal protection claims and the State's rebuttal are based on the same set of facts, the Sixth Amendment "protection against the exclusion of blacks from his petit jury . . . did so in a way that was inseparable from the corresponding protection accorded him by the equal protection clause." (820 F.2d at 1145)

Furthermore, one commentator has recognized that, although this Court designed the procedures in *Batson* to cure an equal protection violation, it

> "is not incompatible for the same action giving rise to equal protection remedies to have also violated the sixth amendment. In such a case, the equal protection violation justifies the equal protection remedies. The same action, as a sixth amendment violation, justifies the application of those remedies . . . under the sixth amendment." (Note, *Sixth and Fourteenth Amendments—The Swain Song of the Racially Discriminatory Use of Peremptory Challenges*, 77 J. Crim. L. & Criminology 821, 840 (1986))

It has been suggested in another article that references to "large, distinctive groups" and "identifiable segments playing major roles in the community" in *Taylor* were written with respect to groups which could not be excluded in the venire stage. But it was pointed out that at the petit jury selection stage that the fair cross section

rule must be balanced by the competing interests of the peremptory challenge. After observing that the overwhelming evidence of the abuse of peremptory challenges to exclude racial minorities justified use of the fair cross section rule to curb this abuse, it was argued that

> "[u]ntil evidence is developed to establish that jury participation by nonracial groups is being thwarted on a large scale by the use of peremptory challenges, only racial groups should be protected from peremptory exclusion." (Doyel, 38 Okla.L.Rev. 385, 440-1)

In this case, the exclusion of blacks by peremptory challenge was surely as much a Sixth Amendment violation as an equal protection infringement. Consequently, the sound method for determining the infraction discovered in *Batson* should apply in the case of denials, as here, of the Sixth Amendment right.

II. ALTHOUGH PETITIONER IS WHITE, HE NEED NOT BE A MEMBER OF THE EXCLUDED GROUP TO CLAIM CONSTITUTIONAL ERROR AND, SO, HE HAS STANDING TO CHALLENGE AS VIOLATIVE OF THE CONSTITUTIONAL RIGHT TO TRIAL BY IMPARTIAL JURY THE REMOVAL IN HIS CASE OF ALL BLACK PROSPECTIVE JURORS BY STATE PEREMPTORY CHALLENGE.

It has repeatedly been recognized in situations where an allegation arises that the State has deprived the defendant of Sixth Amendment rights by removing group members from jury service that the defendant need not be a member of that group in order to object. (*Duren*, 439 U.S. 357, 359 n 1; *Taylor*, 419 U.S. 522, 526; *Wheeler*, 583 P.2d 748, 764; *Musto*, 540 F.Supp. 346, 351; *United States* v. *Biaggi*, 680 F.Supp. 641, 653 (S.D.N.Y 1988)) In *Peters* v. *Kiff*, 407 U.S. 493, this Court authorized white defendants to complain (under the Fourteenth Amendment due process clause) about systematic exclusion of blacks from their juries. (See *State* v. *Wagster*, 489 So.2d 1299, 1303 (La.App. 1986).) The ability of white defendants to challenge the State's removal of blacks by peremptory exclusion has been recognized by other courts on the basis of this Court's decision in *Peters*. (See *United States* v. *Gometz*, 730 F.2d 475, 478 (7th Cir. 1984); *United States* v. *Clark*, 737 F.2d 679, 681 (7th Cir. 1984); *State* v. *Superior Court*, 760 P.2d 541; *Seubert* v. *State*, 749 S.W.2d 585.) It is likewise appropriate this Court accord to white defendants constitutional standing to argue that exclusion of blacks violates their Sixth Amendment guarantee of right to trial before an impartial jury. White petitioner Holland should thus be permitted to contest at a hearing on remand the State's removal by peremptory challenge of all black prospective jurors by which to thereby interfere with his right to the fair possibility that members of that cognizable group would serve on his jury.

For, the facts here suggest a prima facie case of constitutional violation. The background of both black prospective jurors here, as shown by their responses to the trial judge's inquiries, clearly indicated they were qualified to serve as jurors (J.A. 2-6) No effort was made by the prosecutors to ask additional questions in order to indicate doubt as to eligibility and the State summarily employed its peremptory challenges to remove each of them from the panel. As a result, no blacks were seated on petitioner's petit jury. On this basis, petitioner deserves a hearing in the trial court at which to prove a prima facie case of State interference by means of racially motivated peremptory challenges with the clear possibility a representative cross-section of the community would comprise his trial jury. This Court should therefore now both recognize the Sixth Amendment right to a jury chosen through

a nondiscriminatory process (applicable to petitioner in State court through the due process clause of the Fourteenth Amendment) and apply it to him by setting aside the contrary decision of the Illinois Supreme Court and remanding for a hearing on the State's unconstitutional use of its peremptory challenges.

CONCLUSION

Wherefore, petitioner prays that the judgment of the Illinois Supreme Court be reversed and the cause be remanded with directions that a hearing be conducted on the State's use of its peremptory challenges to exclude blacks from the jury at his trial.

Respectfully submitted,

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